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In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76 - 1726

MOBIL OIL CORPORATION, ET AL.,
Petitioner

versus

MRS. FRANCES NELL HIGGINBOTHAM, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

RESPONSIVE BRIEF ON BEHALF OF MRS. ARLINE J. SHINN

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TABLE OF CONTENTS

	PAGE NO.
The Question Presented	1
Argument	2
"The Basis of *Moragne v. States Marine Lines*"	2
"DOHSA and the Jones Act Are Not Exclusive Remedies"	5
"Territorial Restriction of *Moragne-Gaudet* Would Create New Anomalies"	14
Conclusion	20
Certificate of Service	22

TABLE OF CASES

	PAGE NO.
Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974)	12,17
Dennis v. Central Gulf Steamship Corp., 453 F.2d 137 (5th Cir. 1972), cert. den., 409 U.S. 948, 34 L.Ed. 2d 218 (1972)	19
Doyle v. Albatross Tanker Corp., 367 F.2d 465, 466-467 (2d Cir. 1966)	7
Dugas v. National Aircraft Corp., 438 F.2d 1386 (3rd Cir. 1971)	9,12
Estate of Kauzlarich, 405 F.Supp. 332 (D. S.C. 1975)	19
Executive Jet Aviation v. City of Cleveland, Ohio, 409 U.S. 249, 34 L.Ed. 2d 454, 466, 467 (1972)	20
Fitzgerald v. United States Lines Co., 374 U.S. 16, 10 L.Ed. 2d 720, 724 (1963)	6,8,19
Gillespie v. United States Steel Corp., 379 U.S. 148, 13 L.Ed. 2d 199 (1964)	16
Hammil v. Olympia Airways, S.A., 398 F.Supp. 829 (D.C. Cir. 1975)	19

TABLE OF CASES (Continued)

	PAGE NO.
Higginbotham v. Mobil Oil Corp., 545 F.2d 422 (5th Cir. 1977)	19
Law v. Sea Drilling Corp., 523 F.2d 793, 795 (5th Cir. 1975)	18
Marsh v. Buckeye Steamship Co., 330 F.Supp. 972 (N.D. Ohio 1971)	17
McLaughlin v. Blidberg Rothchild Co., 156 F.Supp. 379 (S.D. N.Y. 1966)	13
Moragne v. States Marine Lines, 398 U.S. 375, 26 L.Ed. 2d 339, 349, 350, 352, 353, 354,361 (1970)	1,2,3,4,6,14,16,17,20,21
Noel v. Linea Aeropostal Venezolana, 260 F. Supp. 1002 (S.D. N.Y. 1966)	14
Nye v. Svendborg, 358 F.Supp. 145 (S.D. N.Y. 1973)	19
Peace v. Fidalgo Island Packing Co., 419 F.2d 371 (9th Cir. 1969)	7
Petition of Gulf Oil Corp., 172 F.Supp. 911 (S.D. N.Y. 1959)	16
Petition of Risdal & Anderson, Inc., 291 F.Supp. 353 (D. Mass. 1968)	7

TABLE OF CASES (Continued)

PAGE NO.

Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 23 L.Ed. 360 (1969). 18

Romero v. International Terminal Operating Co., 358 U.S. 354, 3 L.Ed. 2d 368, 382, 383 (1959) 8,12,20

Sea Land Services v. Gaudet, 414 U.S. 573, 39 L.Ed. 2d 9, 23 (1974) 2,6,11,14

Sennett v. Shell Oil Co., 325 F.Supp. 1, 7 (E.D. La. 1971) 19

Spiller v. Thomas M. Lowe, Jr. & Associates, 466 F.2d 903 (8th Cir. 1972) 17

The Four Sisters, 75 F.Supp. 399 (D. Mass. 1947). 8

The Hamilton, 207 U.S. 398, 52 L.Ed. 264 (1907) 12,16

The Harrisburg, 119 U.S. 199, 30 L.Ed. 358, 359, 360, 362 (1886) 1,2,3,5

The Sea Gull, 21 Fed. 909, 910 (C.C.Md. 1865) 17

Thompson v. Offshore Co., 1977 A.M.C. 1434 (S.D. Tex. 1977) 19

TABLE OF CASES (Continued)

PAGE NO.

STATUTES:

Death on the High Seas Act, 46 U.S.C.§§ 761, 764, 768, et seq. 4,5,6,8,9 12,14,15,16,18,19

Federal Employees Liability Act, 45 U.S.C. §§ 51, et seq. 4

Federal Tort Claims Act, 28 U.S.C. §§1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671, et seq. 5

Jones Act, 46 U.S.C. § 688 4,5

Longshoremen and Harbor Workers. Compensation Act, 33 U.S.C.§§901, et seq. 4

Maritime Lien Act, 46 U.S.C.§§971, et seq. 9

2 Benedict on Admiralty, § 81 at 7-8, § 84 at 7-37 (7th Ed. 1975) 8,16,19

59 Cong. Rec. 4480, 4482, 4483, 4484, 4485, 4486 (1920) 10,12

G. Gilmore and C. Black, Jr., The Law of Admiralty, § 6-31 at 364, 365, § 6-33 at 369, 370 (2d Ed. 1975). 21

TABLE OF CASES (Continued)

PAGE NO.

S. Speiser, 2 Recovery for Wrongful Death 2d, §14:5 at 421-422, n. 64, § 14:6 at 423 (2d Ed. 1975). 12

J. Stein, Damages and Recovery: Personal Injury and Death Actions, §268 at 606 (1972). 17

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THE QUESTION PRESENTED

The issue presented to the Court in this litigation is whether the cause of action for wrongful death under the General Maritime Law which this Court recognized in *Moragne v. States Marine Lines*, in overruling *The Harrisburg*, supplements the Jones Act and the Death on the High Seas Act to allow recovery of nonpecuniary damages.

ARGUMENT

"The Basis of *Moragne v. States Marine Lines*"

"We accordingly overrule *The Harrisburg*, and hold that

an action does lie under *General Maritime Law* for death caused by violation of maritime duties." [1] This Court, speaking through Mr. Justice Harlan in *Moragne*, unanimously reversed nearly a century of jurisprudence and recognized the existence of a cause of action for wrongful death under the General Maritime Law. The pithy and unambiguous statement representing the holding of this Court is unrestricted and contains no territorial or geographic boundaries or limitations. The cause of action for wrongful death enunciated by this Court in *Moragne* and explained further in *Sea-Land Services v. Gaudet*, [2] runs in favor of the beneficiaries of decedents " 'who go down to the sea in ships and do their business on the great waters' " [3] regardless of the location of the delict--whether on the high seas or within the territorial waters of a state or nation.

At issue in *The Harrisburg* [4] was whether one could maintain a "suit in admiralty . . . in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea . . .?" [5] The Court deductively reasoned that the roots of American maritime law are embedded deeply in the soil of British admiralty practice, which at that time precluded this cause

1. *Moragne v. States Marine Lines*, 398 U.S. 375, 26 L.Ed. 2d 339, 361 (1970).

2. 414 U.S. 573, 39 L.Ed. 2d 9 (1974).

3. *The Highland Light*, Chase's Dec. 150, quoted in *The Harrisburg*, 119 U.S. 199, 30 L.Ed. 358, 360 (1886).

4. 119 U.S. 199, 30 L.Ed. 358 (1886).

5. *The Harrisburg, supra*, 30 L.Ed. at 359.

of action, also; and the Court overruled a long line of district and circuit court authority to hold that no action lies in admiralty for deaths occurring on the high seas or on the navigable waters. A major basis for the Court's opinion denying the wrongful death action is succinctly summarized in one statement by the author of that opinion: "[W]e know of no country that has adopted a different rule on this subject for the sea from that which it maintains on land". [6] However, the Court in *The Harrisburg* did not restrict its holding to territorial waters; it extended to the high seas, also.

In *Moragne*, Mr. Justice Harlan scrutinized the rationale of the common law doctrine precluding recovery for wrongful death, the ground upon which *The Harrisburg* was decided. The rule denying recovery of compensatory damages for the wrongful death of an individual was based on the concept that the wrongful act constituted both a tort and a felony; as such, the offending party's property was confiscated by the state, and the felony was punishable by death. The United States did not adopt the felony merger doctrine; while the felonious act of the offending party could be punishable, his property was not confiscated by the state.

This Court in *Moragne* stated that it was difficult to discern an adequate reason for extending the common-law rule to actions governed by maritime law. The admiralty had always been a separate body of law apart from that of common law: (1) It was administered by different courts; (2) its roots were in the civil law; and (3) it developed general principles different from those of the common law recognizing a special solicitude for those who embark on hazar-

6. *Id.* at 382.

dous duties on the sea.

Then, turning to ascertain whether there is any legislative or public policy prohibiting wrongful death actions in admiralty, this Court concluded that there was none.

Decisional law often finds its bases in legislative enactments. As Justice Harlan in *Moragne* stated, particular legislation plays a broader role than the limited parameters drawn by the enactments of a legislative body. It is an obligation of the Court to interweave legislative policies with the body of decisional legal principles.[7] In the United States, every state has enacted wrongful death legislation; in addition, the Congress has enacted a body of laws permitting recovery for wrongful death. (Federal Employees Liability Act,[8] Jones Act,[9] Death on the High Seas Act,[10] Federal Tort Claims Act[11] and Longshoremen and Harbor Workers' Compensation Act[12]) Accordingly, this Court reasoned that the heretofore existing public policy against recovery for wrongful death had been abrogated; and, rather, the public policy now is to favor recovery for the wrongful death of an individual.

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7. *Moragne, supra,* 26 L.Ed. 2d at 352.

8. 45 U.S.C.§§51, *et seq.*

9. 46 U.S.C. § 688.

10. 46 U.S.C§§761, *et seq.*

11. 28 U.S.C. §§1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671, *et seq.*

12. 33 U.S.C§§901, *et seq.*

When this Court reconsidered its decision in *The Harrisburg* and overruled it finding its reliance on English authority for wrongful death actions misplaced, practitioners before the admiralty bar had thought that a final vestige and yoke of anachronistic legal authority had been thrown off and discarded from American maritime law. However, old theories and historical precedents, no matter how misplaced or misguided their logic and basis may be, die slowly and often attempt to rear their heads in a last chance at survival, only to realize finally that their days have long since gone and like victims to the vicissitudes of life at sea are lain to rest at last. Respondent rhetorically asks, as did the author of the opinion in *The Harrisburg:* "Why should a different rule be adopted on this subject for the high seas from that which it [applies] on land and on territorial waters?" Clearly, such an arbitrary and illogical conclusion cannot be defended on moral, rational or legal grounds.

"DOHSA and the Jones Act Are Not Exclusive Remedies"

Petitioner submits to this Court that the Death on the High Seas Act[13] and/or the Jones Act[14] is the exclusive remedy for deaths occurring on the high seas. As Congress has enacted legislation to provide a remedy and a basis for recovery for deaths occurring on the high seas, the area is preempted, and the courts are precluded from delineating the rights, duties and liabilities of parties in that field.

Yet, petitioner ignores the interplay and relationship in the field of maritime law between statutory authority and

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13. *Supra,* n. 10.

14. *Supra,* n. 9.

jurisprudential authority. Admiralty law and practice in the United States constitutes both statutory and jurisprudential elements which have been woven together into a flexible fabric. As this Court in *Fitzgerald v United States Lines Co.*[15] stated:

> Article III of the Constitution vested in the federal courts jurisdiction over admiralty and maritime cases, and, since that time, the Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law. This Court has long recognized its power and responsibility in this area and has exercised that power where necessary to do so.

Petitioner's position that DOHSA and/or the Jones Act is the exclusive remedy for deaths occurring on the high seas and that decisional law, *Moragne* and *Gaudet*, cannot supplement the congressional enactments is untenable, particularly when one considers that the courts in the past have so judiciously woven together the rights and remedies afforded to seamen by statutory as well as decisional law. The Jones Act [16]was enacted by Congress to overrule the fellow-servant doctrine, thus affording a seaman a cause of action for negligence against his employer. It is elementary in admiralty law that the Jones Act is not the sole and exclusive remedy afforded to seamen for personal injuries sustained while in the service of the vessel; a seaman has at his disposal the additional remedy of unseaworthiness, a remedy created by decisional law. The proposition advanced by petitioner in this cause would have the Court ignore this type of interelationship between statutory and

15. 374 U.S. 16, 10 L.Ed. 2d 720, 724 (1963).

16. *Supra*, no. 9.

decisional remedies created for the benefit of an injured seaman.

In addition, the courts have interpreted neither DOHSA nor the Jones Act to be the exclusive remedy to recover for the death of a seaman on the high seas. The Second Circuit in *Doyle v. Albatross Tanker Corp.*[17] answered that inquiry in the negative stating:

> There is not a whisper in the text of the Jones Act or its legislative history to indicate that, with respect to seamen in the special area covered by the Death on the High Seas Act, Congress intended the Jones Act to supersede the Death on the High Seas Act . . . . Moreover, it appears to be the settled law of the lower federal courts, expressed in numerous cases, that both statutory remedies may be availed of for the purpose of recovering damages for the wrongful deaths of seamen caused by occurrences on the high seas, and that the action in admiralty created by the Death on the High Seas Act may be pursued by the personal representative of a deceased sailor as well as the action at law provided for in the Jones Act.

The Jones Act, while it provides a remedy to recover damages from the employer for the death of the seaman, allows recovery only on the basis of negligence. Yet, the courts have augmented this statutory remedy with the

17. 367 F.2d 485, 466-467. (See, also, *Petition of Risdal & Anderson, Inc.*, 291 F.Supp. 353 (D. Mass. 1968); *Peace v. Fidalgo Island Packing Co.*, 419 F.2d 371 (9th Cir. 1969); G. Gilmore and C. Black, Jr., *The Law of Admiralty*, § 6-31 at 364 (2d Ed. 1975).

Death on the High Seas Act's more liberal basis of recovery, that is, for the breach of the warranty or seaworthiness. [18] In addition, DOHSA, in supplementing and complementing the Jones Act, affords a remedy for an additional class of beneficiaries to that of the Jones Act. [19] Furthermore, a claimant may join a claim under the Jones Act with an action based on the breach of warranty of seaworthiness and with that of the traditional maritime remedy for maintenance and cure and have all actions tried to a jury. [20] This interplay of statutory remedies and the integration of statutory and decisional law are the hallmarks to the flexibility of the admiralty. As these elements have been woven together, so can the now judicially recognized action for wrongful death under the General Maritime Law be added as another strand to strengthen that fabric which constitutes the admiralty law of the United States.

The interrelationship of statutory remedies is not limited to the interaction between these federal statutes, DOHSA and the Jones Act. In addition, the admiralty courts have traditionally enforced rights afforded to litigants by state law. As Mr. Justice Frankfurter in *Romero v. International Terminal Operating Co.* [21] stated:

> Although the corpus of admiralty law is federal in the sense that it derives from the implication of Article 3 evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the

18. 2 *Benedict on Admiralty*, § 81 at 7-8 (7th Ed. 1975).

19. *The Four Sisters*, 75 F.Supp. 399 (D. Mass. 1947).

20. *Fitzgerald, supra*, n. 15

21. 358 U.S. 354, 3 L.Ed. 2d 368, 382 (1959).

> States and the National Government in their regulation of maritime commerce.

Despite the fact that Congress has enacted legislation governing maritime liens,[22] the remedies and rights afforded by this legislative authority are not exclusive, for liens created by state laws are enforceable in admiralty. In addition, the admiralty borrows from and enforces state laws and rules for "the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under the contracts of maritime insurance. . . ." [23] The liberal policy of the admiralty law to adopt and borrow from other bodies of law is a tribute to its adaptibility and vitality which allows it to set trends rather than lag behind as a mere follower of precedent and tradition.[24]

In addition, that DOHSA evidences no intention on the part of Congress to make the Act the sole and exclusive remedy for deaths occurring on the high seas is clear from the legislative history and debates on the floor of the House of Representatives. As originally proposed, Section 7 of the Act stated as follows:

> That the provisions of any state Statute giving or regulating rights of action or remedies for death shall not be affected by this Act as to causes of action accruing within the territorial limits of any State.[25]

22. 46 U.S.C.§§971, *et seq.*

23. *Romero, supra*, 3 L.Ed. 2d at 383.

24. See, also, *Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971).

25. 59 *Cong. Rec.* 4480 (1920).

The legislative debates on the Act demonstrate that one of the major concerns of congressmen was that Section 7, as originally proposed, might restrict the rights of action and remedies afforded by state law to its citizens.[26] Congressman Mann of Illinois led the opposition to Section 7 because of his concern that the legislation would abrogate a citizen's right to remedies extended to him by state law. He, therefore, successfully brought an amendment to the Act deleting the last clause, leaving Section 7 to read as follows:

> That the provisions of any state Statute giving or regulating rights of action or remedies for death shall not be affected by this Chapter.[27]

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26. *Id.*, at 4484.

27. 46 U.S.C. § 768:

> THE SPEAKER PRO TEMPORE. The gentleman from Illinois offers an amendment, which the Clerk will report. The Clerk read as follows:
>
> Amendment offered by Mr. Mann of Illinois: Page 3, line 12, after the word "act," strike out "as to causes of action accruing within the territorial limits of any State."
>
> MR. MANN OF ILLINOIS: Now, I do not know whether I am right or wrong about it, because I have not examined the report on this bill carefully as reported this time. But I remember this bill very distinctly in previous Congresses, and my impression, which very likely may be erroneous, is that the purpose of the bill was to confer jurisdiction in certain cases of death where no jurisdiction now exists. I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court. I may be wrong about that. I notice in the report in one place, on page 2, this statement from somebody:

This Court in *Gaudet*, after studying the legislative history of DOHSA, found that the legislation and the congressional intent do not abate or preclude the creation of a jurisprudential remedy to operate concurrently with the statutory scheme:

> We recognize, of course, that our decision permits recovery of damages not generally available under the Death on the High Seas Act. . . . After combing the legislative history of the Death on the High Seas Act, we concluded in *Moragne* that Congress expressed 'no intention . . . of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.' [Citation omitted.] Nothing in the legislative history of the Act suggests that Congress intended the Act's statutory measure of damages to pre-empt any additional elements of damages for a maritime wrongful death remedy which this Court may deem 'appropriate to effectuate the policies of general maritime law.'[28]

(Footnote 27 - Continued)

> We are very anxious to have the bill go through in its present simple form, which avoids conflict with State statutes and yet remedies a crying defect in the maritime law as administered in this country – and so forth.
>
> *If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not.* In other words, if a man had a cause of action and could get service, he could sue in a State court and not be required to bring suit in the Federal court. 59 Cong. Rec. at 4484, emphasis supplied.

28. *Gaudet, supra*, 39 L.Ed. 2d at 23, no. 22.

Thus, this Court has previously held that DOHSA is not exclusive and that the General Maritime Law operates as a supplement to augment the previously provided statutory remedy.[29]

It has been held by this Court that it is not inimical to the interests of the Maritime Law to apply state laws in maritime causes of action.[30] In *The Hamilton*,[31] the Court, through Mr. Justice Holmes, unequivocally held that state law in an action for wrongful death between citizens of the same state could be utilized by the claimant as a means of recovery for wrongful death. The passage of DOHSA, as amended, did not in any way restrict, limit or affect the holding of this Court in that case.[32]

It is further evident from the congressional debates on the Act that DOHSA was intended to be a jurisdictional statute, only conferring jurisdiction in the federal court for deaths occurring on the high seas. A primary concern during the debates was the effect of encroaching federal jurisdiction on that of the state courts.[33] The Act removed a jurisdictional bar; it did not create an exclusive remedy.

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29. See, also, S. Speiser 2 *Recovery for Wrongful Death 2d*, § 14:5 at 421-422, n. 64, wherein the author implicitly criticizes the First Circuit's reasoning in *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974), that DOHSA is the exclusive remedy for deaths occurring on the high seas; see, also, G. Gilmore and C. Black, Jr., *The Law of Admiralty*, §6-31 at 365.

30. *Romero, supra*, n. 21.

31. 207 U.S. 398, 52 L.Ed. 264 (1907).

32. See, also, *Dugas v. National Aircraft Corp., supra*, n. 24.

33. 59 *Cong. Rec.* 4482-4486 (1920).

It is further submitted that, with respect to the elements of damages recoverable under DOHSA, the Act is not exclusive, for by its express provisions the incorporation of foreign law is permitted to supplement the damages recoverable under the Act. Section 764 states as follows:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.[34]

In *McLaughlin v. Blidberg Rothchild Co.*,[35] two libels were brought to recover for the wrongful death of an American seaman occurring in Japan. The first libel was for the recovery of the pecuniary damages sustained and was predicated on the Jones Act and DOHSA; the second was to recover the nonpecuniary damages sustained by the decedent, including the pain and suffering of the decedent, and was predicated on the wrongful death provisions of the Japanese Civil Code. The court permitted the integration of these bases of recovery to allow the litigants to be compensated for the pecuniary, as well as the nonpecuniary, damages.

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34. 46 U.S.C. § 764.

35. 156 F.Supp. 379 (S.D. N.Y. 1957).

Again, in *Noel v. Linea Aeropostal Venezolana,*[36] 46 U.S. C. § 764 was relied on specifically to permit the recovery of nonpecuniary damages, in that instance loss of solatium, with the incorporation of Venezuelan law to supplement DOHSA.

Must American citizens who lose their lives on the high seas depend upon incorporation of the law of a foreign state in order to recover nonpecuniary damages? Must an American citizen who loses his life on the high seas be denied full recovery for the nonpecuniary damages sustained merely because of the fortuitous citizenship of a tortfeasor? Such grounds for permitting or denying recovery of particular damages lacks a rational basis and is contrary to the reasoning and sound grounds on which this Court decided the *Moragne* case.

"Territorial Restriction of *Moragne-Gaudet* Would Create New Anomalies"

Prior to *Moragne*, the rules of law which had evolved concerning the rights and remedies for wrongful deaths occurring on the high seas and in state territorial waters created three anomalies which the Court recognized as inequitable:

> [First] within the territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produced liability if the victim was merely injured, but frequently not if he was killed.

36. 260 F.Supp. 1002 (S.D. N.Y. 1966).

> [Second], identical breaches of the duty to provide a seaworthy ship, resulting in death, produced liability outside the three-mile limit . . . but not within the territorial waters of a State when a local statute excluded unseaworthiness claims.
>
> [Third], a true seaman–that is, a member of a ship's company, covered by the Jones Act was provided no remedy for death caused by unseaworthiness within territorial waters while a longshoreman to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, did have such a remedy when allowed by a State statute.[37]

These anomalies recognized by the Court have destroyed the constitutionally mandated uniformity of the maritime law.

> Our recognition of a right to recover for wrongful death under General Maritime Law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. [Citations omitted.] Such uniformity not only will further the concerns of both of the 1920 Acts [DOHSA and the Jones Act] but also will give effect to the constitutionally based principle that Federal Admiralty Law would be a 'system of law co-extensive with, and operating unformly in, the whole country.'[38]

37. *Moragne, supra,* 26 L.Ed. 2d at 353-354.
38. Id. at 350.

The anomalies created by the territorial distinctions noted by the Court in *Moragne* would be perpetuated and even new inconsistencies would be created if the *Moragne* cause of action for wrongful death were to be geographically limited solely to those deaths occurring on territorial waters. [39] For example, the rule of *The Hamilton*[40] would remain viable permitting actions to be brought under state law for wrongful death where the claimant and defendant are citizens of the same state.[41] Claimants who would be able to avail themselves of foreign law pursuant to 46 U.S. C. § 764 to complement DOHSA could recover nonpecuniary damages, whereas those unable to utilize that provision of the Act would be precluded from that recovery. *Finally, true seamen–those covered by the Jones Act–would be limited to recovery under the Jones Act and DOHSA and would be foreclosed from relying on a state statute to recover nonpecuniary damages, a remedy available to nonseamen who die on the high seas!* [42]

To territorially limit the holding of *Moragne* would limit the elements of recovery depending on the fortuitous location of the death and the citizenship of a tortfeasor. Why should elements of damages depend on these fortui-

39. See 2 *Benedict, supra*, §84, 7-37.

40. *Supra*, n. 31.

41. See, also, *Petition of Gulf Oil Corp.*, 172 F.Supp. 911 (S.D. N.Y. 1959), wherein Judge Palmiere utilized the provisions of the Pennsylvania survivor's action to supplement DOHSA for recovery of the decedent's pain and suffering.

42. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 13 L.Ed. 2d 199 (1964).

tous circumstances, particularly when a uniform body of federal law should apply? Should the rights of claimants be any more or less when delictual conduct is committed on the high seas rather than territorial waters? Respondent respectfully submits that to geographically restrict the *Moragne* cause of action would be an arbitrary and capricious limitation which contravenes the admiralty's "special solicitude for the welfare of those men who undertake to venture upon hazardous and unpredictable sea voyages" and contradicts the rule of the "humane and liberal character of proceedings in admiralty to give than to withhold the remedy."[43]

It is respectfully submitted that petitioner's reliance on *Barbe v. Drummond*[44] is misplaced for two reasons. First, the First Circuit was concerned with the issue of recovery on behalf of the administrator of decedent's estate damages for the decedent's conscious pain and suffering prior to death, an element of damages permitted by the survival action as opposed to a wrongful death action. It followed the lead of the Eighth Circuit to create a survival action under the General Maritime Law.[45] Second, "the *Barbe*

43. ". . . and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *Moragne, supra*, 26 L.Ed. 2d at 349, quoting from *The Sea Gull*, 21 Fed. 909, 910 (C.C. Md. 1865).

44. 502 F.2d 794 (1st Cir. 1974).

45. See *Spiller v. Thomas M. Lowe, Jr., & Associates* 466 F.2d 903 (8th Cir. 1972), and *Marsh v. Buckeye Steamship Co.*, 330 F.Supp. 972 (N.D. Ohio 1971); *S. Speiser, supra*, § 14:6 at 423 (2d Ed. 1975); J. Stein, *Damages and Recovery: Personal Injury and Death Actions*, § 268 at 606 (1972).

Court would allow conscious pain and suffering under the 'federal maritime survival action, created by decisional law' but would deny loss of society [and loss of services] for the same reason,"[46] an illogical result.

That court in dictum stated that DOHSA was the exclusive remedy for deaths occurring on the high seas. Yet, it employed the methodology used by this Court in *Moragne* to create a survival action permitting the recovery of non-pecuniary damages for the conscious pain and suffering of decedent prior to her death.[47] This contradition cannot be reconciled without concluding that the General Maritime Law complements and supplements the statutory remedies enacted by Congress: Decisional law as enunciated by this Court augments the lacunae left by congressional legislation.[48]

Many courts since the *Moragne* decision have reasoned that the cause of action created by that landmark case has no geographic limitations and that the statutory remedy may be joined with the jurisprudentially recognized remedy to permit recovery of the full panoply of damages for deaths occurring on land. In *Sennett v. Shell Oil Co.*[49] Judge Rubin analyzed the *Moragne* decision and concluded

46. *Law v. Sea Drilling Corp.*, 523 F.2d 793, 795 (5th Cir. 1975).

47. See *Speiser, supra*, § 14:5 at 421, n. 64.

48. Similarly, state law is adopted as surrogate federal law to fill the voids left by federal law for actions occurring on fixed platforms on the Outer Continental Shelf *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 23 L.Ed. 2d 360 (1969).

49. 325 F.Supp. 1 (E.D. La. 1971).

that Congress, by enacting DOHSA, did not intend to place a limitation on the recovery for maritime wrongful death:

> As *Moragne* pointed out,the policy implicit in the state and federal wrongful death statutes indicates that recovery for maritime death should be permitted absent 'a legislative directive to except a particular class of cases.' [Citations omitted.] Congress has not so directed. The Death on the High Seas Act is not an exclusive remedy for those whose relatives perish wrongfully one marine league from shore.[50]

The Fifth Circuit in this case concluded that the heirs of decedents could recover both pecuniary and nonpecuniary damages, pursuant to the nonstatutory maritime wrongful death action.[51] Pecuniary damages are recoverable under the statutory remedies, DOHSA and the Jones Act, where applicable. "The practical effect of such a procedure is to furnish a uniform remedy based on unseaworthiness to beneficiaries of seamen killed within and beyond state territorial waters."[52] This procedure is analagous to the joinder of the statutory Jones Act remedy with the jurisprudential remedy of unseaworthiness and maintenance and cure in personal injury litigation in order to obtain a jury trial.[53]

50. *id.* at 7; see also, *Nye v. Svendborg*, 358 F.Supp. 145 (S.D. N.Y. 1973); *Hammil v. Olympia Airways, S.A.*, 398 F.Supp. 829 (D.C. Cir. 1975); *Estate of Kauzlarich*, 405 F.Supp. 332 (D. S.C. 1975).

51. *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422 (5th Cir. 1977); *Thompson v. Offshore Co,*, 1977 A.M.C. 1434 (S.D. Tex. 1977); see, also *Dennis v. Central Gulf Steamship Corp.*, 453 F.2d 137 (5th Cir. 1972), *cert. den.*, 409 U.S. 948, 34 L.Ed. 2d 218 (1972).

52. 2 *Benedict, supra*, § 84 at 7-37.

53. *Fitzgerald, supra*, n. 15.

To limit the application of *Moragne* to territorial waters would effectively re-entrench in the maritime law a locality test alone which was abrogated by this Court in *Executive Jet Aviation v. City of Cleveland, Ohio*.[54] Maritime jurisdiction requires locality and a "significant relationship to traditional maritime activity."[55] The locality test is a simplistic but often difficult and perplexing rule to apply. This Court in *Executive Jet* noted that "not only is the locality test in such cases wholly adventitious, but it is sometimes almost impossible to apply with any degree of certainity."[56]

CONCLUSION

In summary, the proposition advanced by petitioner is unsupported by this Court's pronouncements in both *Moragne* and *Gaudet* and their progeny. Neither DOHSA nor the Jones Act exist in a vacuum to the exclusiveness of any other remedy, as this Court previously found and as is evidenced by the Act itself and its legislative history.

"Maritime law is not a monistic system."[57]

It is eclectic and borrows its substantive body from a wide range of sources. In fashioning the rules governing the General Maritime Law, this Court has woven together into a flexibile fabric elements of statutory, both federal and state, as well as decisional law. The statutory remedies, DOHSA and the Jones Act, need not rest in the briney deep and they need not be reduced to the "level of a nonstatu-

54. 409 U.S. 249, 34 L.Ed. 2d 454 (1972).

55. *Id.*, 34 L.Ed. 2d at 467.

56. *Executive Jet, supra*, 34 L.Ed. 2d at 466.

57. *Romero, supra*, 3 L.Ed. 2d at 383.

tory Restatement."[58] They may remain as a basis for the recovery of pecuniary damages for deaths occurring on the high seas and may be augmented by the remedy enunciated by this Court in *Moragne*.

Accordingly, respondent respectfully urges that the decision of the Fifth Circuit be upheld.

Respectfully submitted,

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58. G. Gilmore and C. Black, Jr., *The Law of Admiralty*, § 6-33 at 369-370.

CERTIFICATE OF SERVICE

The undersigned counsel for respondent has caused three copies of the foregoing Responsive Brief on Behalf of Mrs. Arline J. Shinn to be served on Carl J. Schumacher, Jr., 1106 Arabella Street, New Orleans, Louisiana 70115; Jack Caldwell, 519 Main Street, Post Office Box 592, Franklin, Louisiana 70538; Messrs. Christovich & Kearney, American Bank Building, New Orleans, Louisiana 70130; Messrs. Thompson and Sellers, Post Office Box 308, 112 South Louisiana Avenue, Abbeville, Louisiana 70510; and I.P. Saal, Jr., Post Office Box 176, Gueydan, Louisiana, by placing same in the United States mail, postage prepaid, this 15th day of December, 1977.

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Jack C. Benjamin